UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SOLID OAK SKETCHES, LLC,	CASE NO. 1:15-cv-724-LTS-RLE
Plaintiff- Counterdefendant,	ECF Case
v.	
2K GAMES, INC. and TAKE-TWO INTERACTIVE SOFTWARE, INC.,	
Defendants- Counterclaimants.	

DECLARATION OF DALE M. CENDALI, ESQ. IN SUPPORT OF DEFENDANTS-COUNTERCLAIMANTS' MOTION FOR JUDGMENT ON THE PLEADINGS

I, Dale M. Cendali, Esq., declare as follows:

1.   I am a partner at the law firm of Kirkland & Ellis LLP, counsel of record for

Defendants-Counterclaimants 2K Games, Inc. and Take-Two Interactive Software, Inc.

(collectively, "Take-Two"). I am licensed in the State of New York and admitted to practice

before this Court. I submit this declaration in support of Take-Two's motion for judgment on the

pleadings.

2.   I have reviewed the video game series *NBA 2K*, including *NBA 2K17*, *NBA 2K16*,

NBA 2K15, and *NBA 2K14*, which were incorporated by reference into Plaintiff-

Counterdefendant Solid Oak Sketches, LLC's ("Solid Oak") Second Amended Complaint. True

and correct copies of each of those video games are attached hereto as **Exhibits A** (*NBA 2K16*),

B (*NBA 2K17*), **C** (*NBA 2K15*), and **D** (*NBA 2K14*).[1] A true and correct copy of the manual of

the Xbox One edition of *NBA 2K16* is attached hereto as **Exhibit E.**[2] For the convenience of the

Court, this declaration summarizes the contents of those video games.

I.   **EXECUTIVE SUMMARY**

3.   *NBA 2K*, created by Take-Two, is a highly detailed video game series that

immerses the user in the sport of professional basketball. Through several different game modes,

users play basketball and also participate in ancillary events to the sport, such as managing a

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[1]   As *NBA 2K16* is the game on which Plaintiff focuses in its Complaint, this declaration likewise focuses on *NBA 2K16*. Each of the games in the *NBA 2K* series, however, share the essential characteristics discussed in this declaration. Each of the games in the *NBA 2K* series features materially similar gameplay mechanics and inclusion of professional basketball players, though the rosters are updated annually to maintain accurate statistics and current player rosters. Additionally, *NBA 2K14, NBA 2K15,* and *NBA 2K17* also feature story modes with materially similar customization options.

[2]   The copies of the *NBA 2K* series included herein are editions made for the Xbox One platform. For the convenience of the Court, Take-Two can loan the Court an Xbox One console. If the Court would like copies of the *NBA 2K* series made for other video game platforms, such as PC or PlayStation, Take-Two can provide copies of those versions as well, though the game is the same on all platforms.

team or practicing against other users. Similarly, in MyCAREER mode, created for *NBA 2K16*

by well-known Hollywood director Spike Lee, users create their own custom avatar player and

watch that player progress through a basketball career from high school to the NBA, with

personal drama interwoven throughout.

4.   As discussed below, Solid Oak has asserted copyright claims against Take-Two

based on tattoos that were inked on NBA players LeBron James, Kenyon Martin, and Eric

Bledsoe (the "Tattoos"). Take Two has created a realistic world using real life details, and this

includes real life NBA Players, presented realistically with their tattoos. The Tattoos at issue in

this case are only a tiny portion of the highly detailed *NBA 2K* games, and often do not appear at

all. The Tattoos only appear on the three players who actually bear the Tattoos in real life:

LeBron James, Kenyon Martin, and Eric Bledsoe. The Tattoos do not appear on any other

player, and a user cannot remove the Tattoos or place them on their own customizable avatar.

When the Tattoos do appear, they normally are difficult to see, and appear only fleetingly during

gameplay and at a much smaller size than in real life due to the nature of the visual game

experience, which effectively shrinks the apparent size of the players. The standard camera view

of the gameplay is from a distance, so the user can see numerous players from both teams

playing basketball.

5.   What follows is a more in-depth description of the game's mechanics, story, and

graphics, with images from the game for additional explanation.

II.   THE *NBA 2K16* VIDEO GAME

6.   Take-Two develops, publishes and distributes the *NBA 2K* video game series.

The series depicts and simulates the sport of professional basketball in the United States. Users

of *NBA 2K* play as either customizable players of their own creation, or as realistic renderings of current and historic NBA players.

7.   When a user starts *NBA 2K16*, the game presents a short trailer showcasing gameplay. The user can choose to skip this video, or watch until the end.

8.   After the introductory trailer, users are directed to create a customized player. Once an avatar is created, users can access the main menu, where they can select a gameplay mode, or other ancillary features of the game. These modes offer an expansive universe of options for users in terms of continuity and length of play, customization of teams and players, play settings, and interaction with other *NBA 2K16* users.

9.   The primary gameplay modes are: PLAY NOW, the standard mode; MyCAREER, a narrative mode; MyGM, from the perspective of a general manager; MyLEAGUE, from the perspective of league administration; and MyTEAM, which focuses on the trading aspects of professional basketball.
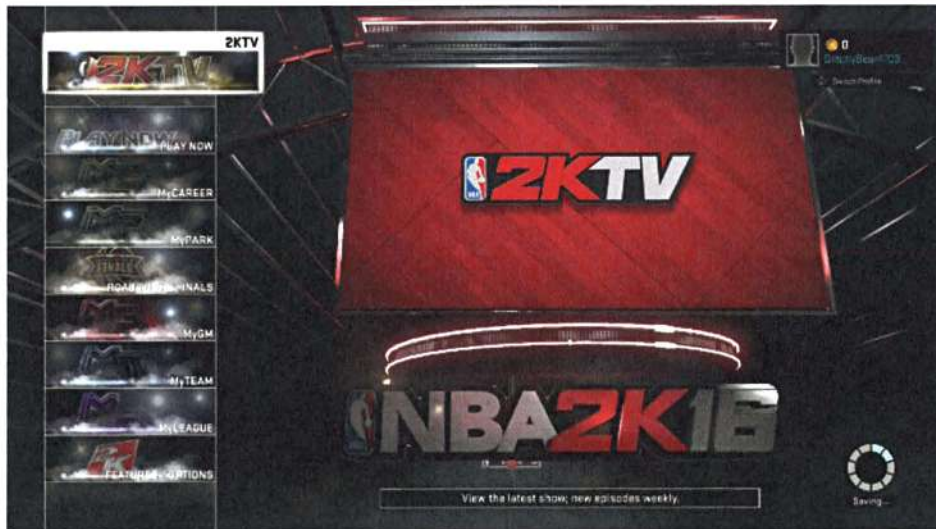

Fig. 1. Main menu showing various gameplay modes and settings: 2KTV, PLAY NOW, MyCAREER, MyPARK, Road to the Finals, MyGM, MyTEAM, MyLEAGUE, and Features/Options.

A.   **Single and Multiplayer Gameplay**

10.   *NBA 2K16* offers a standard gameplay mode called PLAY NOW, which enables a

user to quickly commence and play a virtual basketball game.

Fig. 2. Menu for PLAY NOW mode

11.   PLAY NOW can be played alone against the computer, or with other humans,

either located in the same room or connected online.

12.   In PLAY NOW mode, users must first assemble a team, drawn from real-life

NBA players. Users can select current rosters, or from a custom selection of individual players

from different teams and eras.

13.   *NBA 2K16* depicts over 400 current and retired NBA players. Users can

approximate real-world rosters of 30 current NBA teams, or create "fantasy" teams of players

separated by decades. "Classic" teams include the Portland Trailblazers (1999-2000), the Los

Angeles Lakers (2000-2001), the Dallas Mavericks (2002-2003), the Minnesota Timberwolves

(2003-2004), and the Detroit Pistons (2003-2004). In this mode, actual statistics and records are

emphasized and included to lend a feeling of additional reality to the game.

B.   **Story Modes**

14.   One large component of *NBA 2K16* is the story modes, which feature original

fictional characters, plot, settings, and themes. Instead of choosing from real NBA teams and

players, users playing in these story modes must customize a player of their own creation, called

the "MyPLAYER," to be used in MyCAREER story mode, which is discussed in more detail

below.

i.   MyCAREER Mode

15.   The core story mode in *NBA 2K16* is called MyCAREER. Users must customize a
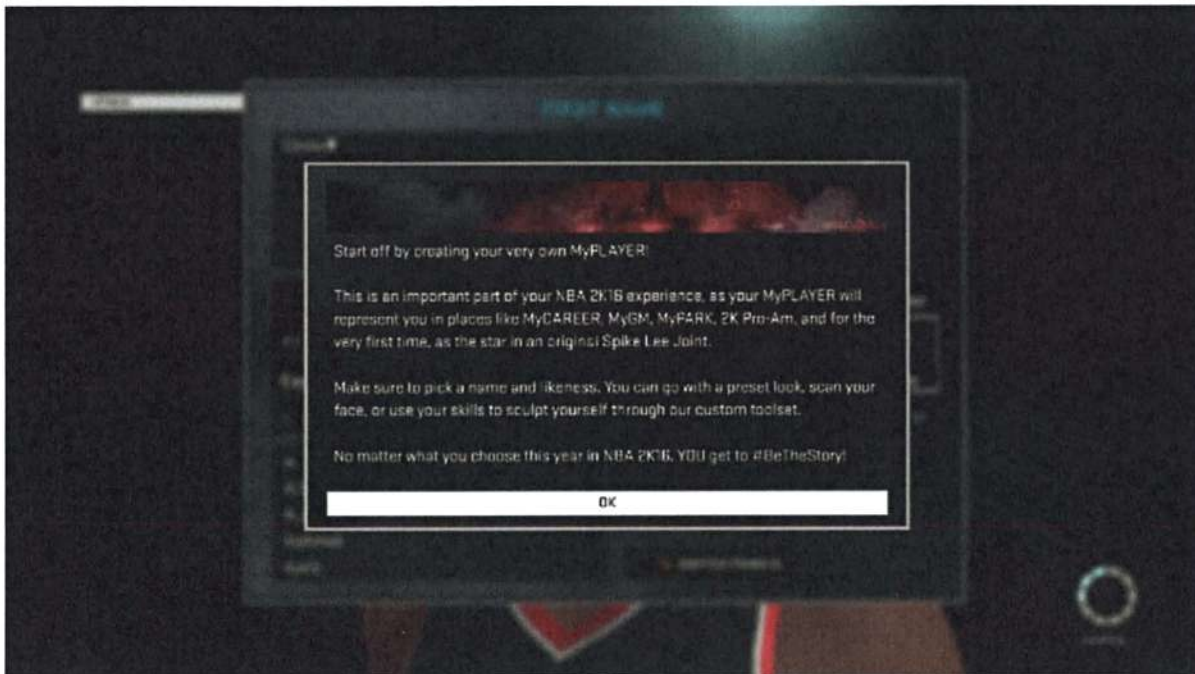
MyPLAYER to begin the narrative.

Fig. 3. Opening prompt to MyCAREER

16.   The custom player follows a narrative called "Livin' Da' Dream," an original story directed by Hollywood director Spike Lee. The narrative follows the custom character starting in high school, eventually climbing the ranks to basketball stardom in the NBA.

Fig. 4. Still from "Livin' Da Dream" depicting director Spike Lee in live-action (top) and rendered through motion-capture (bottom).
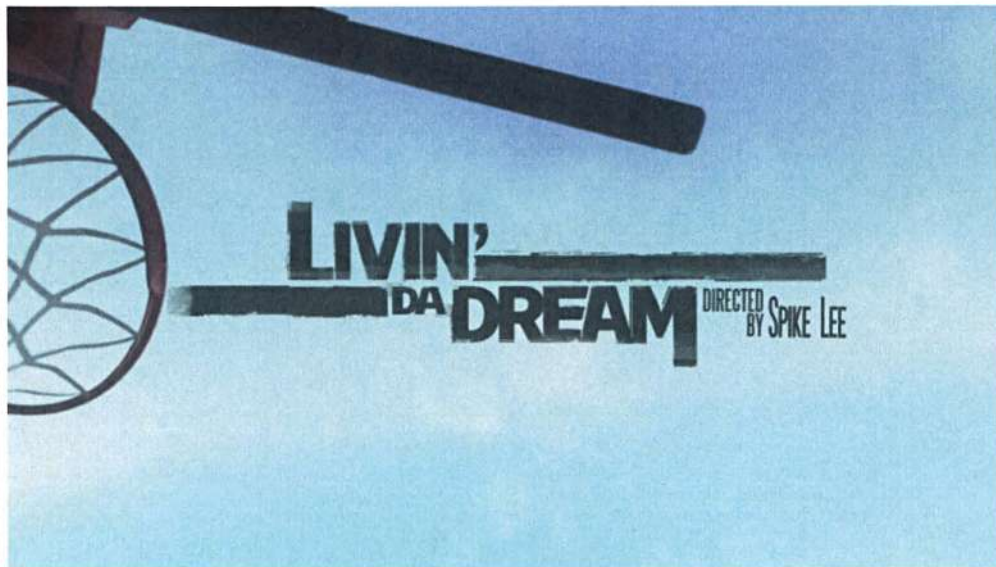
Fig. 5. Opening title from "Livin' Da Dream"

17.   Users play short games throughout the story: three when the character is in high

school, four in college, and eight during the character's rookie season in the NBA.

Fig. 6. Stills from MyCAREER: first game and interstitial

18.   MyCAREER mode progresses like a film, with gameplay interspersed with non-

interactive cutscenes involving the professional and personal dramas of the protagonist. These

dramas include interactions with friends and family and dramas of professional success and

failure in basketball.

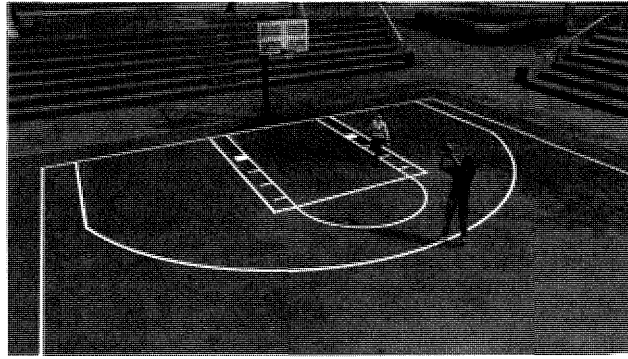19.   The non-interactive content may be skipped at any time.

Fig. 7. Still from MyCAREER.

20.   The protagonist's nickname is fixed: Frequency Vibrations, or "Freq." Elements

such as the character's tragic backstory and voice cast are also fixed. Thus, the MyCAREER

mode allows the user to experience the highs and lows of a career as a professional basketball

player by merging extensive user personalization in the creation of the MyPLAYER with the

comprehensive and exciting narrative created by director Spike Lee.

ii.   MyPLAYER and Customization Features

21.   *NBA 2K16* permits extensive customization of the MyPLAYER appearance and

skill set. Users spend in-game Virtual Currency, or "VC," to unlock various types of content for

their players.

22.   Users can customize the player's attributes (such as jump shooting, rebounding,

defending), spending in-game points on attribute upgrades. These attributes enable a user to

improve the performance of their MyPLAYER. Points also unlock particular animations,

signature moves of NBA players, and mannerisms. The level of customization is so extensive

that a user can choose whether the custom player chews gum.

Fig. 8. Still from player customization options.

23.   Users also may scan their own faces to create a custom MyCAREER player, using the built-in cameras on their consoles or extensions.

24.   Other customization functionalities focus on various aspects of gameplay. MyCOURT customizes the aesthetics of the basketball court and locker: users can spend points on customizing elements such as backboards, floors, nets, rims, scoreboards, walls, and locker room furniture.
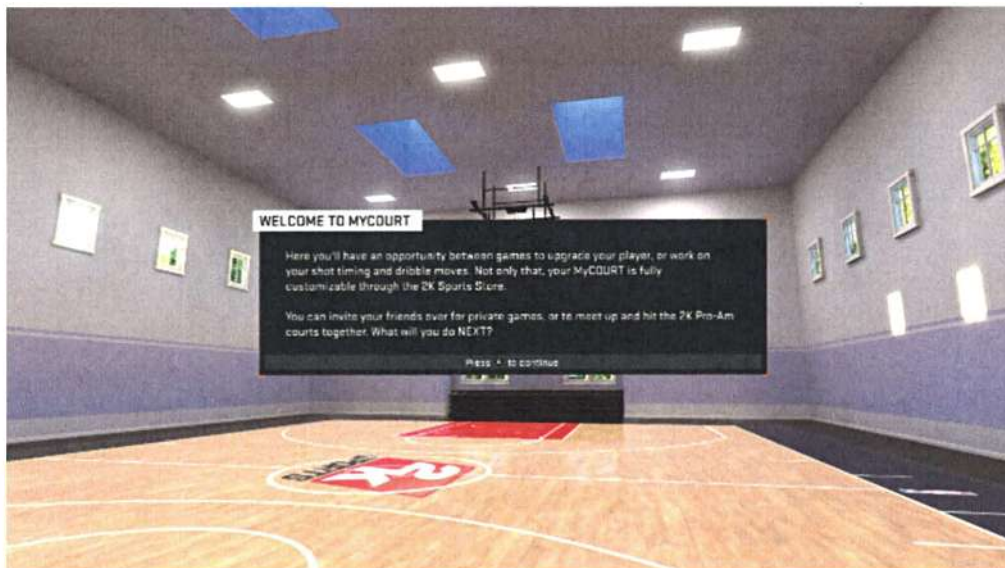

Fig. 9. MyCOURT prompt

iii.   Other Gameplay Modes

25.   *NBA 2K16* offers numerous other modes in which the user can experience the sport of professional basketball aside from the standard modes and the story mode. These additional modes illustrate the expansive nature of *NBA 2K* and Take-Two's effort to allow the user to experience all facets of the life of a professional basketball player.

26.   For example, MyGM allows a user to simulate the decisions faced by the general manager of a professional basketball team.

27.   In MyGM, the goal is to make the team turn a profit and win championships. Users can monitor the physical wear-and-tear of players, handle conversations about trading or playing time, negotiate contracts, provide playing facilities, and build trust with the team and its staff.

28.   MyLEAGUE allows the user to control the NBA organization as a whole, controlling entire franchises over the course of many seasons. Users can set salary caps, trading rules, and set whether players become fatigued over the course of the season.

29.   Another gameplay mode is MyTEAM. MyTEAM focuses on the trading aspect of professional basketball. Users can build their ultimate team of professional basketball players through virtual trading cards, which come in varying power and rarity, purchased with in-game Virtual Currency.

30.   An additional gameplay mode is MyPARK, which enables online play of the customized MyPLAYER against other custom players from *NBA 2K16* users through three online, outdoor communities. Users can play pick-up games and develop their MyPLAYER's skill attributes.

31.   MyPARK includes customization, including team logos, color schemes, and jersey styles, though users cannot select depictions of current or past NBA players to be used in MyPARK.

32.   Finally, 2K Pro-Am mode allows for online play against other custom teams. The teams in this mode draw exclusively from custom players. Users cannot select depictions of current or past NBA players to be on their Pro-Am team.

C.   Graphics and Audio

33.   The game soundtrack incorporates color commentary by professional sportscasters, cheering crowds, buzzers, and a fifty-song soundtrack curated by chart-topping producers DJ Khaled, DJ Mustard, and DJ Premier. The game also features realistic announcers for the court's PA systems, promotion, and outdoor announcements.

34.   Users can control the game audio, selecting from multiple presets that simulate different environments: for example, TV Broadcast elevates the in-game commentary, while On Court accentuates the player sounds.

35.   The extensive in-game commentary includes voices from sportscasters and analysts from CBS Sports, ESPN, and other real-world networks. These real-life sports professionals include CBS sportscaster Kevin Harlan for play-by-play commentary, CBS sports analysts Clark Kellogg and Greg Anthony and Golden State Warriors head coach Steve Kerr for color commentary, ESPN reporter Doris Burke for sideline reporting, CBS sportscaster Ernie Johnson for "studio" hosting, and former basketball players Shaquille O'Neal and Kenny Smith for studio analysis.
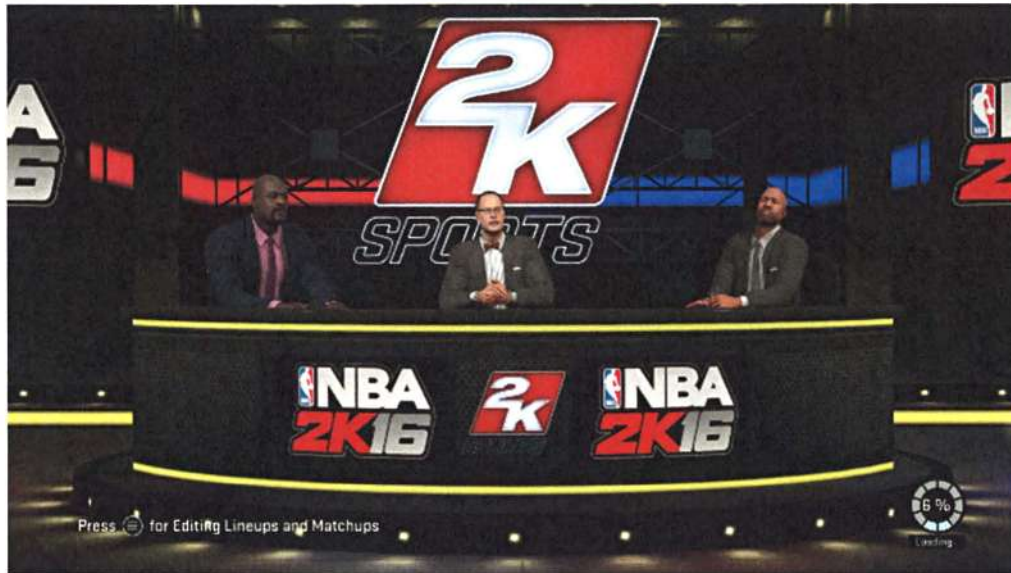
Fig. 10. Pregame Show Featuring Analysts Ernie Johnson, Shaquille O'Neal and Kenny Smith

36.   During gameplay, camera angles are optimized to allow the user to view multiple players at a time. This allows the user to pass the ball and maneuver players around the court.

Fig. 11. Still from PLAY NOW mode

37.   The cameras shift automatically over the course of the game. The default camera view is from a distance, so that users can see multiple players from both teams at once, as is

necessary to pass the ball and direct the players around the court. Due to the varying camera angles, elements may be out of focus or in the background, and players may be obstructed by other parts of the court or by other players. Users can also shift cameras manually according to their preference. Users can select among dozens of camera angles, each with their own named presets.

Fig. 12. Camera Angle: Broadcast (Generic)

Fig. 13. Camera Angle: Skybox

Fig. 14. Camera Angle: Press

Fig. 15. Camera Angle: High School

38.   Players are depicted playing basketball as realistically as possible. The game depicts players moving as they would in real life: running, dribbling, walking, shooting, and passing. Jerseys and sportswear accurately track with the colors, logos and numbering schemes of real-world teams. The game even includes NBA-branded socks.
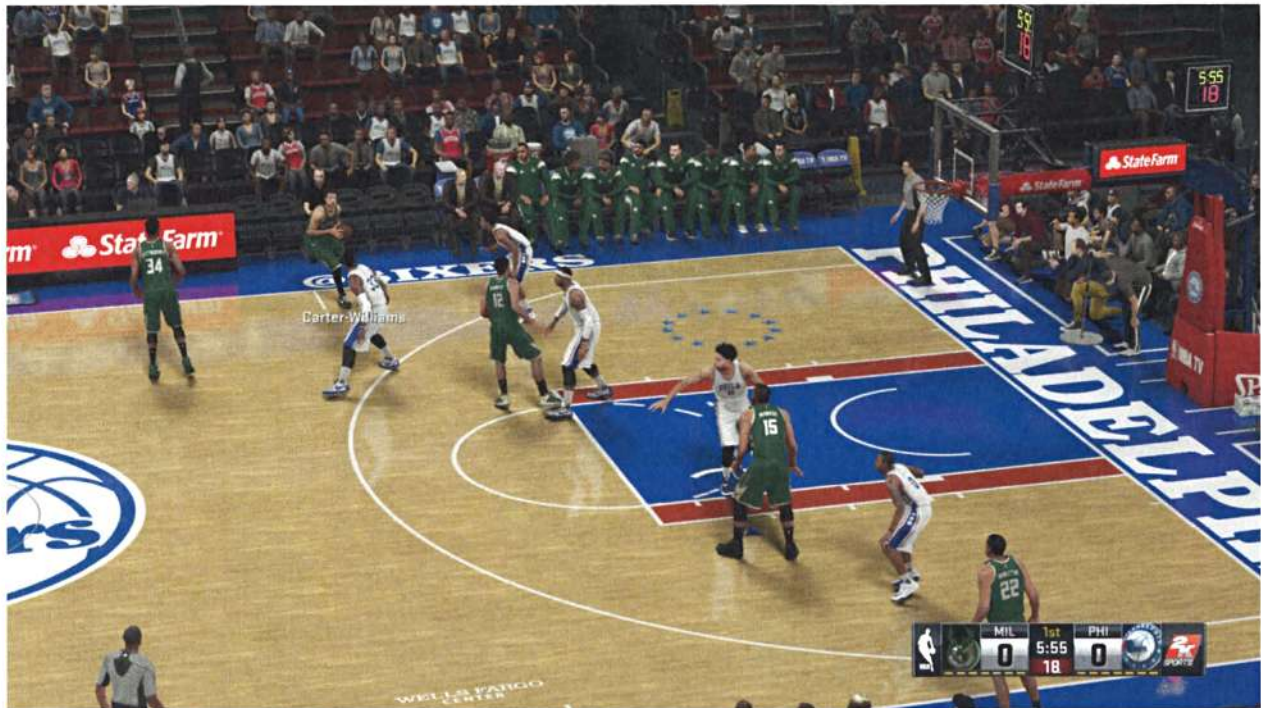
Fig. 16. Still from PLAY NOW mode, illustrating arena and court

39.   When players on the team are not actively on the court, they are seated on the

bench with the rest of the team, located on the side of the court. The camera does not focus on

the side of the court, though players may occasionally be visible on the sidelines.

40.   When players are not actively on the court, they are often dressed in alternative

uniforms, or tracksuits, featuring long pants and long sleeves.

Fig. 17. Still from PLAY NOW mode, showing the bench

41.   The user can select the length of time for the game by setting the quarter length to a certain amount of minutes through the options menu.

42.   *NBA 2K16* used extensive motion-capture with professional players, dancers and mascots. As a result of this extensive motion-capture technology and attention to detail, *NBA 2K16* includes realistic depictions of mascots, dancers, coaches, and other individuals associated with basketball games aside from the players. These depictions include realistic facial and physical features for each NBA player, including height, weight, and general facial and physical characteristics.

43.   *NBA 2K* sets the gameplay within realistic arenas which are designed to depict arenas as they would appear in the real world, including stadium seating and the professional basketball court and hoops.

44.   As viewable from the Xbox console, *NBA 2K16* has a file size of over 40 gigabytes, with additional megabytes stored on a user's game console.

D.   Gameplay

45.   The game features various gameplay modes, and centers around a set of intricate mechanics intended to simulate NBA games. Users control individual players on a team, switching between players by passing the ball.

Fig. 18. Still from PLAYNOW Mode

46.   The materials associated with the game emphasize the realistic and expansive depiction of the physical complexity of playing professional basketball. For example, the manual for *NBA 2K16* explains all of the various maneuvers that users may execute. *See* Ex. E.

47.   Users can manipulate dozens of parameters for every aspect of gameplay. The game offers different setting for, say, whether the coach permits late-game fouling; or how often a player attempts dunks.

Fig. 19. Settings for player and coach behavior

48.   Gameplay is executed through the console controller, which is configured to enable basic and advanced sets of controls for optimal flexibility. Basic controls require selection of one button on the controls. More advanced maneuvers are available with timed combinations of buttons. For example, a user seeking to pass on the Xbox One need only push "A," but a user seeking to execute a fake pass must combine the "Y" and "A" buttons "while standing or driving." *See* Ex. E, at 3–6. Certain maneuvers are only available given certain game conditions, such as a "Post Hook" which requires that the user is within "close range" of the hoop. *See id.* at 9.

49.   In addition to the set of basic and advanced controls, *NBA 2K16* offers a "PRO

STICK" for more specialized dribbling and shooting maneuvers. For example, to execute a

"Half-Spin Dribble," a player must rotate the controller's right stick in a quarter-circle from the

ball to the hoop, then quickly return it to the neutral position. These skilled shots are harder to

master. *Id.* at 7–8.

50.   In addition to control presets, users can manipulate other parameters of the

controller, to unlock or customize play mechanics.

Fig. 20. Controller settings for parameters such as "Defensive Assist Strength" and
"Pass Target Presets"

51.   As a result of these expansive controls, *NBA 2K16* enables dozens of minor

variations in each action. For example, a user seeking to pass the ball may choose to Pass;

Bounce Pass (a pass that bounces the ball off the court); Lob Pass (an overhead pass); Flashy

Pass (a pass that is difficult for the other team to block); Fake Pass (a feint); Alley Oop (a pass to

another player, who jumps to catch it, and immediately dunks the ball); Give & Go (passing to a

player, running to the basket, receiving the ball to shoot), or modify any of the above in combination with other maneuvers. *Id.* at 5–6.

52.   A key feature of the *NBA 2K16* gameplay is the divergent skill sets of each basketball player in the game. As in real life, not every *NBA 2K16* player can execute every maneuver with equal skill. This means that team selection is a crucial component of gameplay.

III.   TATTOOS IN *NBA 2K16*

A.   Solid Oak's Asserted Tattoos

53.   Solid Oak has asserted copyrights in five tattoos: "Child Portrait Tattoo Artwork," "330 and Flames Tattoo Artwork," "Wizard," "Basketball with Stars and Script," and "Script with a scroll, clouds, and doves." Solid Oak submitted applications with the U.S. Copyright Office for each Tattoo seeking to register it. As part of those applications, Solid Oak was required to submit deposit copies showing the works that it was registering.

54.   A true and correct representation of the work entitled "Child Portrait Tattoo Artwork" deposited in the Copyright Office is attached hereto as **Exhibit F**.

55.   A true and correct representation of the work entitled "330 and Flames Tattoo Artwork" deposited in the Copyright Office is attached hereto as **Exhibit G**.

56.   A true and correct representation of the work entitled "Wizard" deposited in the Copyright Office is attached hereto as **Exhibit H**.

57.   A true and correct copy of the representation of the work entitled "Basketball with Stars and Script" deposited in the Copyright Office is attached hereto as **Exhibit I**.

58.   A true and correct copy of the representation of the work entitled "Script with a scroll, clouds, and doves" deposited in the Copyright Office is attached hereto as **Exhibit J**.

59.   LeBron James' hometown is Akron, Ohio, which has the telephone area code "330."[3]

B.   Tattoos as Part of Real Player Depiction in NBA 2K16

60.   The Tattoos appear **only** as part of Take-Two's realistic depictions of LeBron James, Kenyon Martin, and Eric Bledsoe in *NBA 2K*. They do not appear on other real-world NBA players or on the fictional MyCAREER players that users can create.

61.   All three players are depicted with multiple tattoos in addition to the Tattoos at issue, as they appear in real life.

62.   The Tattoos appear in proportion to the other tattoos on the players' bodies, just as they would in real life. Additionally, the Tattoos appear in proportion to their bodies, which are reduced to fit proportionally to whatever television screen is being used to play the games.[4]

63.   When Messrs. Bledsoe, James or Martin do not appear in the game, neither do their Tattoos. There are over 400 players from which a user can choose, and numerous other characters in MyCAREER and other modes. Thus, there are at least 397 characters whose avatars do not bear the Tattoos.

64.   At no point can a user customize, manipulate or alter the physical features of real NBA players, including their Tattoos. At no point does the game ever depict the Tattoos in any

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[3]   The Court can take judicial notice of LeBron James's official biography on ESPN, which states that he was born in Akron, Ohio. A true and correct copy of that biography is attached hereto as **Exhibit K**. The Court can also take judicial notice of the fact that, according to the North American Numbering Plan Administration (NANPA) which administers the North American Numbering Plan of area codes, the area code "330" belongs to Akron, Ohio. A true and correct copy of the area code map from NANPA is attached hereto as **Exhibit L**.

[4]   Take-Two acknowledges that a user could, during an instant replay, pause the game to zoom in on various features of the court and players. However, Take-Two does not cause this zoom function to occur at any time, and pausing to zoom during instant replays is not part of the normal flow of gameplay.

manner other than through the real-life likenesses of the three players. The Tattoos cannot be depicted on any other avatar.

65.   *NBA 2K16* does not emphasize the Tattoos any more than other physical characteristics of the players on which they are inked in real life. The Tattoos are not specially backlit or any clearer than the other graphics, nor are they highlighted in any way. The Tattoos and the NBA Players on which they are inked do not appear on the covers of *NBA 2K*.[5]

66.   If a user selects Messrs. Bledsoe, James, or Martin in gameplay, other players often block the Tattoos from view—much as would occur in a real game of basketball as players defend and block each other. The Tattoos, and other physical features of the players, can be blocked by other players, by physical objects on the court, like a basketball or the hoop; or they can simply be off camera at the time or out of sight. In addition, players in *NBA 2K* are moving, often quickly, during the basketball games. This movement makes it harder for a user to observe the Tattoos.

67.   During normal gameplay, the camera is angled to provide users with a full view of the basketball court. In addition to physical objects blocking the Tattoos, these camera angles show infrequent, obstructed, and unfocused depictions of any Tattoos in the game.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 9th day of August, 2017.

Dale M. Cendali, Esq.

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[5]   The only exception to this statement is LeBron James, whose photograph appears on the cover of *NBA 2K14*. A true and correct copy of the cover of *NBA 2K14* is attached hereto as **Exhibit M**. Two of the four Tattoos belonging to Mr. James are not visible at all; the other two Tattoos are incomplete as the photograph depicts Mr. James with his hands up in victory rather than down by his side. These two Tattoos also appear with several other tattoos on Mr. James's arms, thereby reducing focus and observability of these particular Tattoos. *See* Ex. M.